IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
vs.	:	
	:	
CALVIN DAVIS	:	NO. 02-90

MEMORANDUM

ROBERT F. KELLY, Sr. J. **MARCH 10, 2003**

Presently before the court is defendant Calvin Davis' Motion to Dismiss the Indictment.[1] On February 13, 2002, a Federal Grand Jury returned an indictment charging Keith Davis, Calvin Davis, Kevin Whitaker, and Albert Cropper with conspiracy to distribute cocaine and crack cocaine, including many other counts involving the distribution of cocaine and crack cocaine. Calvin Davis is charged with the conspiracy, and also with two counts of distribution of crack cocaine (Counts II and III), three counts of distribution of cocaine (Counts VII, VIII and XI) and one count of felon in possession of a firearm (Count XIII), and three counts of money laundering (Counts 18 through 20).

Calvin Davis has filed the current motion seeking dismissal of all or part of the indictment alleging numerous instances of prosecutorial misconduct.

At the outset we note, that a district court's power to dismiss an indictment based upon prosecutorial misconduct is limited. United States v. Breslin, 916 F.Supp. 438 (E.D.P.A.

[1]In his motion Davis notes a number of "irregularities" and concludes that the grand jury was empaneled for longer than 18 months. Davis requests this Court to issue an order requiring the government to produce an order extending the grand jury, and, absent the order, to dismiss the indictment. This frivolous request is unnecessary. Included as Government Exhibit 1 to this response is a copy of the Honorable Anita B. Brody's order extending the grand jury to February 25, 2002, two weeks after the February 13, 2002 indictment date.

1996). In the absence of fundamental errors such as racial or gender discrimination in the selection of the jurors, a harmless error inquiry applies to claims of prosecutorial misconduct before the grand jury. Therefore there must be a showing of actual prejudice to a defendant. Bank of Nova Scotia v. United States, 487 U.S. 250, 255-56 (1988). Prejudice is established if the violations substantially influenced the grand jury's decision to indict or if there is grave doubt that the decision to indict was freed from the substantial influence of such violations. United States v. Mechanik, 475 U.S. 66, 78 (1986).

In ruling upon defendant's motion we must also bear in mind that a district court may not invoke its supervisory powers to dismiss an otherwise valid indictment based upon the competence of the evidence presented to the grand jury. United States v. Williams, 504 U.S. 36, 54 (1992). As Williams warned, "[a] complaint about the quality or adequacy of the evidence can always be re-cast as a complaint that the prosecutor's presentation was 'incomplete' or 'misleading'." 504 U.S. at 54.

Defendant's Contention that Prosecutor Failed to
Seek the Dismissal of Two Allegedly Biased Grand Jurors

On April 20, 2000, Kevin Oliphant testified before the grand jury. After a long delay, on March 7, 2001, the government resumed presentation of the evidence in this matter before the grand jury. At that time FBI Special Agent Jesse Coleman summarized the evidence to be presented, including the fact that Oliphant had previously testified. One of the grand jurors engaged the Assistant United States Attorney in a conversation concerning Oliphant. The grand juror made it clear that she was unaware of Oliphant's business (he is a convicted narcotics

dealer) but that she lived near his family and that her children went to school with Oliphant. (Government exhibit G)

This grand juror was one of those defendant contends should have been dismissed. Although the record does not reflect it, this grand juror in fact recused herself from all further testimony in the case and did not vote to return the indictment. Affidavits to that effect from the grand juror who recused herself and from the grand jury foreperson have been submitted as government exhibits 2 and 3.

On March 14, 2001 Special Agent Coleman again appeared before the grand jury. On that day he played three lengthy tape recorded conversations between Keith Davis and Calvin Davis which had been captured on a federal wiretap. After the third tape was played a grand juror said "Why is it necessary to listen to all of these tapes when one alone is damning enough? Why torture us?" I agree with the government's contention that the remark, in an of itself shows no bias toward Calvin Davis. It merely shows that the grand juror recognized the incriminating nature of even the few tapes played on that day. The prosecutor immediately instructed the grand jury that in order to determine the accuracy of any proposed indictment, the grand jurors must have heard all of the conversations included within the indictment. (Government exhibit 4, pp. 19-20) During the same session the prosecutor repeated that individual distributions of narcotics cannot be included in the indictment unless the grand jurors have heard the underlying conversations which the government alleges culminated in the distributions. Later the prosecutor repeated that the government "can't . . . present a series of transactions and distributions as part of an indictment unless you heard evidence of it." (Government exhibit 4, pg. 22) Defendant Calvin Davis does not point to any other portion of the grand jury transcript where he alleges any

other remarks by grand jurors reflected bias. I find that the remark of the grand juror merely reflected that the grand juror did not understand what the law required before an indictment could be returned as to all of the allegations in the proposed indictment. This was promptly cured by the instruction from the Assistant United States Attorney. I find no error in the procedure followed and certainly nothing that would warrant dismissal of the indictment.

Defendant's Allegation that the Prosecutor Failed to
Correct Misleading Testimony Presented to the Grand Jury

On January 23, 2002 Special Agent Coleman testified that Calvin Davis was not present during a search of Davis' apartment on July 1, 1999, but that he arrived during the search in a Mercedes Benz accompanied by his girlfriend. Special Agent Coleman then testified that a gun with an obliterated serial number was seized from the car glove compartment. Davis is charged in Count XIII as a felon in possession of this weapon. In his motion Davis claims that Coleman misled the grand jurors because the FBI 302 of the incident which was created two weeks after the incident occurred and turned over by the government to the defense in discovery, notes that Davis was not present during the search and that only his girlfriend, Sunday Carter, was in the Mercedes Benz. In fact, Davis was not present during the search and was not in the car as the 302 accurately reported. The motion to dismiss the indictment fails to mention that Special Agent Coleman gave additional testimony which corrected the earlier statement and which clearly shows that the previous testimony was a mere misstatement. In response to the prosecutors next question, "Did anybody say whose gun it was . . . .?" Special Agent Coleman answered "The girlfriend who was in the car by herself said she didn't know whose gun it was." (Exhibit E, pg. 7, lines 17-18) As the government points out in its brief the correction appears

only nine lines below the error cited in the motion to dismiss. Needless to say that allegation is without merit.

Defendant's Motion Alleges Prosecutorial Misconduct
Because It Presented Perjured Testimony to the Grand Jury

The basis for this allegation is as follows:

On May 9, 2001, Darren Plaza made the first of two appearances before the grand jury. Plaza admitted that he was a federal prisoner testifying under a plea agreement he reached with the government. He acknowledged that the plea agreement required him to plead guilty to federal narcotics offenses and cooperate with the government, including testifying before the grand jury and at trial, if necessary. Assistant United States Attorney Richard Zack, who prosecuted Plaza was present in the grand jury room but took no part in questioning Plaza. Plaza testified that he first began buying and selling cocaine in 1995. (Government exhibit I, pg. 5) He explained that he initially sold quarter pound quantities of cocaine, but that he eventually met Keith Davis who was interested in acquiring kilogram quantities, so he then sold the larger quantities rather than the smaller ones.

Calvin Davis' motion notes that A.U.S.A. Zack's 5K1.1 motion on behalf of Plaza which was filed one year after Plaza's grand jury testimony, identified criminal convictions involving cocaine sales by Plaza in 1987 and 1989. (Government exhibit J, pgs. 4-5) Because of this, Davis' motion concludes that Plaza's testimony that he started selling cocaine in 1995 "was clearly a lie and the government knew of the lie at the time." (Motion, pg. 7)

The A.U.S.A. who questioned Plaza at the grand jury states in his response to this motion, that he was unaware of Plaza's criminal history, and had not discussed it with Plaza

before his grand jury appearance. I accept that statement as true. Plaza was never specifically asked to give his criminal history. I agree with the government's contention that a fair reading of Plaza's testimony shows that Plaza likely understood the prosecutor's question "when did you first become involved in narcotics activities," to mean when did you first become involved in narcotics deals with the Davises. A careful reading of Plaza's testimony would have to lead one to the conclusion that he was involved in narcotics activities before 1995 or 1996. I say this because his grand jury transcript reflects that Plaza first discussed his relationship with Andy Russo, his cocaine supplier and Juan Adames, his cocaine delivery man. He then testified to the quantities of the cocaine involved, and then noted that Adames introduced him to Keith Davis in late 1995 or early 1996. (Government exhibit 5, pgs. 5-7) Obviously if he was dealing with Russo and Adames prior to being introduced to Keith Davis he had to have been involved in drug dealing prior to 1995. He made no attempt to hide the prior dealing with Russo or Adames. From all of this I conclude that it is more likely that Plaza when asked the question "when did you first become involved in narcotics activities," construed it to mean when did he first become involved in narcotics activity with the Davises and that there was no intent to deceive. Furthermore, I find that because the Assistant U.S. Attorney who was questioning Plaza had no prior knowledge of his criminal history, certainly had no intention to deceive the grand jurors. For these reasons I find this allegation of the defense motion to be without merit.

Defense Contention that the Prosecutor Made Suggestions to the Grand Jurors as to Inferences He Wanted Them to Draw from the Evidence Relative to the May 8, 1999 Transaction were Improper And Impaired the Independent Role of the Grand Jury

The matters complained of in the defendant's motion are merely the prosecutor accurately summarizing the evidence the grand jury had already heard and framing the issues for the grand jury, which are appropriate functions of the prosecutor before the grand jury. I find the following quotation from U.S. v. Williams supra to be particularly appropriate to this case:

> We accepted Justice Nelson's description in *Costello v. United States*, we held that "[i]t would run counter to the whole history of the grand jury institution" to permit an indictment to be challenged "on the ground that there was inadequate or incompetent evidence before the grand jury." 350 U.S., at 363-364, 76 S.Ct., at 409. And we reaffirmed this principle recently in Bank of Nova Scotia, where we held that "the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment," and that "a challenge to the reliability or competence of the evidence presented to the grand jury" will not be heard. 487 U.S. at 261, 108 S.Ct., at 2377. It would make little sense, we think, to abstain from reviewing the evidentiary support for the grand jury's judgment while scrutinizing the sufficiency of the prosecutor's presentation. A complaint about the quality or adequacy of the evidence can always be recast as a complaint that the prosecutor's presentation was "incomplete" or "misleading." Our words in Costello bear repeating: Review of facially valid indictments on such grounds "would run counter to the whole history of the grand jury institution[,] [and] [n]either justice nor the concept of a fair trial requires [it]." 350 U.S., at 364, 76 S.Ct., at 409.

In its brief the government, out of an abundance of caution devotes pages 11 through 19 to the task of marshaling the evidence presented to the grand jury supporting its action. Although I believe they have performed this function accurately and completely and have demonstrated a solid basis for the indictment, as can be seen from the Williams case, it is not necessary for this court to evaluate the sufficiency of the evidence presented to the grand jury.

For all of the above reasons we enter the following Order.

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O R D E R

AND NOW, this 10th day of March, 2003, after consideration of Calvin Davis' Motion to Dismiss and accompanying Memorandum of Law, and the Government's Response thereto, it is hereby **ORDERED** that the Motion be and the same is hereby **DENIED**.

BY THE COURT:

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ROBERT F. KELLY, SR. J.